



**Navigators Pro
A Division of Navigators Management Company, Inc.
One Penn Plaza, New York NY 10119**

April 21, 2014

VIA EMAIL
jleonard@ml-llp.com

Justin D. Leonard, Esq.
McKittrick Leonard, LLP
111 S.W. Columbia, Suite 1100
Portland, OR 97201

Re: Insured: Absorbent Technologies, Inc.
Policy No.: NY12DOL617813IV
Matter: U.S. Environmental Protection Agency
Insurer: Navigators Insurance Company
Claim No.: DOL251698

Dear Mr. Leonard:

Navigators Pro, a division of Navigators Management Company, Inc., is the authorized representative for Navigators Insurance Company ("Navigators" or "Insurer") which issued policy no. NY12DOL617813IV ("Policy") to Absorbent Technologies, Inc. ("Absorbent", "Company", "Insured" or "Debtor"). Please be advised that I am the adjuster handling the Matters involving (1) an undated letter from the U.S. Environmental Protection Agency ("EPA") notifying Dave Moffenbeier of his "potential liability at the Queen Avenue and Ferry Street Sites located in Linn County, Oregon ("Letter"), (2) the EPA's Unilateral Administrative Order for Removal Action issued on March 26, 2014 in the matter of Ferry Street Property, Absorbent Technologies Site, located in Albany, Linn County, Oregon, Lombard Foods, Inc., Respondent, docket no. CERCLA-10-2014-0092 ("Order"), and (3) Lombard Foods, Inc.'s ("Lombard") Proof of Non-Professional Administrative Expense, in the amount of \$444,853.88, filed in Absorbent's bankruptcy proceeding in the U.S. Bankruptcy Court for the District of Oregon ("Proof"). All future correspondence should be directed to my attention. The purpose of this letter is to advise you of our position with respect to coverage for these Matters.

Please note initially that this letter shall supplement, and not replace, prior written communications issued by or on behalf of Navigators regarding these Matters, including but not limited to my letter of March 26, 2014 to Mr. Moffenbeier acknowledging receipt of a March 21, 2014 e-mail from Willis, Absorbent's broker, and reserving all rights and defenses with respect to the EPA's undated Letter. This letter shall also acknowledge receipt of your letter of April 8, 2014, written as counsel for the Debtor Absorbent's Chapter 7 Trustee Kenneth S. Eiler ("Trustee") to supplement Willis' prior notice to Navigators with respect to the EPA's Letter and now also with regard to the EPA's Order. Please also note that Navigators does not lend any credence to the allegations raised in the EPA's Letter, the EPA's Order nor Lombard's Proof (collectively, as utilized previously, "Matters"). In considering your request for coverage, we have carefully reviewed the insurance Policy referenced above, as well as the allegations and theories of liability asserted. No other policies were considered.

We value Absorbent a customer and appreciate its business; however, we must inform you that there is no coverage under the Policy captioned above for the Matters submitted, as more fully discussed below. After you have reviewed this letter, if there is additional information you would like me to consider, please forward such information to me. Also, if you have any questions about the letter, please contact me. In addition, if you assert a right to coverage under another policy issued by Navigators, please submit notice pursuant to the notice provisions contained in that policy.

Based on the information we have received to date, it is our present understanding that you are "request[ing] coverage for the claim/loss relating to the costs of remediation and emergency environmental response of the [EPA] and private parties regarding the Debtor's two facilities in Albany, Oregon. We further understand that one of the so-called private parties not identified in your letter may be Lombard.

With regard to the Matters, the EPA alleges that when Absorbent ceased operations on or about October 2013 it left an "acrylonitrile storage tank and other chemicals at the Site without supervision and/or properly maintained fire suppression and vapor detectors." The EPA was purportedly required to initiate an emergency action plan to stabilize the chemicals, address the most urgent threats and oversee the landlord's respective remediation efforts. The EPA apparently incurred over \$400,000 in response costs through January 31, 2014 and, according to your letter, "far more" response costs are being incurred by the EPA at the Site. Your letter further advises that Absorbent's Trustee and the "landlords" have negotiated a settlement with the EPA but that such settlement has not as yet been approved by the EPA. In addition, your letter advises that the Debtor faces significant liability from its landlords one of whom apparently is Lombard.

As we best understand it, your "request for coverage" includes a request for Navigators' written consent to the Debtor's "proposed" settlement with the EPA.

Navigators issued SmartPolicy No. NY12DOL617813IV to Absorbent prior to its bankruptcy filing with, initially, an effective policy period of July 1, 2012 to July 1, 2013 but which was extended thrice, first to September 1, 2013 pursuant to Endorsement no. 6, second to November

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1, 2013 pursuant to Endorsement no. 7, and third to November 1, 2014 pursuant to Run-Off Endorsement no. 10 (in toto the aforesaid Policy). Pursuant to Amend Declarations Page Endorsement no. 9, the Policy is subject to a maximum aggregate limit of liability of \$2,000,000 for the Directors and Officers Liability ("D&O") Coverage Part. The Policy is also subject to a \$25,000 retention for each claim under Insuring Agreement C (optional Entity Coverage as purchased). Pursuant to Section VI.A. of the D&O Coverage Part:

No retention will apply . . . to **Loss**¹, including **Costs of Defense**, incurred by the **Insured Persons** if advancement or indemnification of such **Loss** by the **Company** is neither required nor permitted under applicable law or, if advancement or indemnification of such **Loss** by the **Company** is required or permitted under applicable law, such advancement or indemnification is not made solely by reason of the **Company's Financial Insolvency**².

If the Matters had presented a covered "Claim", both the limit of liability for "Loss", and the retention, would have been inclusive of "Costs of Defense". Relevant Policy provisions are referenced below; please refer to the Policy for its complete terms and conditions.

We now refer you to the applicable sections of the Policy.

Based on the allegations of the Matters, the only potentially applicable Coverage Part under the Policy would be the D&O Coverage Part. If you believe that the other purchased Coverage Part applies, kindly advise and I will be glad to discuss same with you.

Subject to the terms, conditions, limitations and exclusions of the Policy, Section I.A. Insuring Agreement of the D&O Coverage Part provides:

The Insurer will pay to or on behalf of the **Insured Persons** all **Loss** which the **Insured Persons** is legally obligated to pay as a result of a **Claim** first made against the **Insured Persons** during the Policy Period . . . for a **Wrongful Act** by the **Insured Persons**, except for **Loss** which the **Company** actually pays as advancement or indemnification.

Section I.B. Insuring Agreement of the D&O Coverage Part provides:

The Insurer will pay to or on behalf of the **Company** all **Loss** which the **Insured Persons** are legally obligated to pay as a result of a **Claim** first made against the **Insured Persons** during the Policy Period . . . for a **Wrongful Act** by the **Insured Persons**, but only to the extent the **Company** is required or permitted by law to pay such **Loss** to or on behalf of the **Insured Persons** as advancement or indemnification.

¹ The meaning of terms set forth in bold-face type or quoted are as defined in the Policy.

² "**Financial Insolvency**" is defined at Section II.F. of the General Terms and Conditions of the Policy to mean "becoming a debtor in possession, or the appointment of a . . . trustee . . . to control, supervise, manage or liquidate such entity."

To the extent Mr. Moffenbeier qualifies as an Insured Person and he incurs Loss including Costs of Defense, please advise whether the Debtor, in the context of its bankruptcy, shall be providing advancement or indemnification. We further note that Section I.C. Insuring Agreement of the D&O Coverage Part provides:

. . . the **Insurer** will pay to or on behalf of the **Company** all **Loss**³ which the **Company** is legally obligated to pay as a result of a **Claim** first made against it during the Policy Period . . . for a **Wrongful Act** by the **Company**.

The term “Claim” is defined at Section II.A. of the General Terms and Conditions of the Policy, and Section II.A. of the D&O Coverage Part, in pertinent part, to include:

1. a written demand for monetary or non-monetary relief made against any **Insured**; . . .
3. a[n] . . . administrative . . . proceeding brought against any **Insured** seeking monetary or non-monetary relief and commenced by the service of a complaint or similar pleading . . .

For purposes of [the D&O Coverage Part], the term “**Claim**” will include an administrative or regulatory investigation of an Insured Person which is commenced by the filing or issuance of a notice of charges, formal investigative order or similar document specifically identifying in writing such Insured Person as a person against whom a Claim . . . may be brought . . .

The term “Wrongful Act” is defined at Section II.J. of the D&O Coverage Part to mean, in pertinent part:

1. any actual or alleged act, omission, error, misstatement, misleading statement, neglect or breach of duty by any **Insured Person** in his or her capacity as such with the **Company**;
2. any matter claimed against any **Insured Person** solely by reason of his or her status with the **Company**; . . .
4. with respect only to coverage under INSURING AGREEMENT C . . . any actual or alleged act, omission, error, misstatement, misleading statement, neglect or breach of duty by the **Company**.

The term “Loss” is defined at Section II.J. of the General Terms and Conditions of the Policy, in pertinent part, to mean:

compensatory damages, punitive or exemplary damages, . . . settlements and **Costs of Defense**; provided, however, that **Loss** will not include . . . any matter deemed

³ The meaning of terms set forth in bold-face type or quoted are as defined in the Policy.

uninsurable under the law pursuant to which this Policy shall be construed. It is understood and agreed that the enforceability of the foregoing coverage shall be governed by such applicable law which most favors coverage for punitive or exemplary damages...

We respectfully draw your attention to Section III.A. Exclusions of the D&O Coverage Part which states, in pertinent part, as follows:

- A. The **Insurer** will not be liable under this Coverage Part to make any payment of **Loss**, including **Costs of Defense**, in connection with any **Claim** made against any **Insured**:

* * *

4. for any actual or alleged: . . .

b. damage to or destruction of any tangible property, including the loss of use thereof.

* * *

9. based upon, arising out of, relating to, directly or indirectly resulting from or in consequence of, or in any way involving actual or alleged seepage, pollution, radiation, emission or contamination of any kind; . . .

The Matters all concern pollution damage at the Site. Accordingly, please be advised that Navigators respectfully denies coverage for the Loss, including Costs of Defense, that may be incurred by Absorbent and/or Mr. Moffenbeier in connection with the Matters pursuant to Exclusions III.A.4. and III.A.9. of the D&O Coverage Part of the Policy.

We also refer you again Run-Off Endorsement no. 9 of the Policy which adds the following exclusion to the Policy:

The Insurer shall not be liable for **Loss** in connection with any **Claim** for, based upon, arising from, or in any way related to any **Wrongful Act** committed or allegedly committed on or after November 1, 2013.

We note that Lombard's Proof concerns rent allegedly due and owing for a period including November 1, 2013 going forward, as well as remediation costs billed by the EPA which may include November 1, 2013 going forward. We also note that the EPA Order references certain activity conducted November 1, 2013 going forward. We further note that the EPA Letter to Mr. Moffenbeier does not recite any specific dates as to Wrongful Acts but may concern activity conducted November 1, 2013 going forward. Accordingly, please be advised that Navigators respectfully reserves its rights to deny coverage for that portion of Loss, including Costs of Defense, incurred by Absorbent and/or Mr. Moffenbeier that are attributable to any **Wrongful**

Act committed or allegedly committed on or after November 1, 2013 pursuant to the additional exclusion set forth in Run-Off Endorsement no. 9 of the Policy.

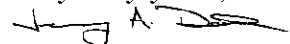
As indicated hereinabove, Navigators respectfully disclaims coverage for Loss including Costs of Defense. With respect to your letter's reference to the consent provision at Section VI.B. of the General Terms and Conditions of the Policy, in light of Navigators' denial please be advise that we will not raise "lack of consent" with respect to any Loss, including settlements and Costs of Defense, that may be incurred by or on behalf of Absorbent and/or Mr. Moffenbeier. Absorbent and/or Mr. Moffenbeier should therefore proceed as prudent non-insureds if proceeding forward with the EPA and any other settlements bearing in mind that this shall be at their own expense and not that of Navigators. Navigators will not be undertaking to protect Absorbent's and/or Mr. Moffenbeier's interests, nor defend nor indemnify them with respect to the Matters.

Navigator's coverage position is based on the information presently available to us. This letter is not, and should not be construed as, a waiver of any terms, conditions, exclusions or other provisions of the Policy, or any other policies of insurance issued by Navigators or any of its affiliates. Navigators expressly reserves all of its rights under the Policy including, but not limited to, Section VIII.D of the General Terms and Conditions of the Policy ("Other Insurance"), as well as the right to assert additional defenses to any claims for coverage, if subsequent information indicates that such action is warranted.

Should you have any additional information that you feel would either cause us to review our position or would assist us in our investigation or determination, we ask that you advise us as soon as possible. Also, if you are served with any additional demands or amended complaints or pleadings, please forward them to us immediately, so that we can review our coverage position.

In closing, please allow me to reiterate that we value Absorbent as a customer, encourage you to contact us should you have any questions or concerns regarding the contents of this letter, and otherwise wish the Trustee and Mr. Moffenbeier well in addressing the Matters.

Very truly yours,



Jeremy A. Deitch, Esq.

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cc: **VIA EMAIL**

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Page 7 of 7

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